# How to Put a Client Through Bankruptcy

Modern American Law Lecture

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# HOW TO PUT A CLIENT THROUGH BANKRUPTCY

BY

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# HOW TO PUT A CLIENT THROUGH BANKRUPTCY

*By*

ARTHUR W. BLAKEMORE, A.B., LL.B.

## PRELIMINARY SUGGESTIONS

One of the most difficult problems which often faces an attorney, is whether to advise a client to go into bankruptcy. The question must be answered by the attorney unselfishly and according to the highest ethics of the profession, as frequently the attorney may believe that he can get a fee for himself by advising a client to go into bankruptcy which he would not otherwise obtain. Advice dictated by reasons of this character, however, is not only unprofessional but bound to lower the reputation of the lawyer who gives it, as a lawyer makes his own reputation, which is usually a pretty accurate mirror of what he really is.

The bankruptcy law is intended for the relief of honest debtors who, through bad management or misfortune, become so hopelessly involved that they, without the aid of the bankruptcy law, could never expect to be again self-supporting or self-respecting citizens. The bankruptcy law has another object, which is to insure a fair and equal distribution of whatever property the bankrupt may possess among

his creditors, also to assure that the creditors actually get what belongs to them. These two objects, the protection of the bankrupt on the one hand, and distribution of property equally on the other, are entirely distinct and, as we shall see, are accomplished under the law by two entirely distinct proceedings. Therefore when a client comes to you asking advice as to whether he shall go into bankruptcy, you should consider the question having in mind the object of the act. You should also remember that the fact that a man has filed a petition in bankruptcy is a serious blot on his business reputation and a serious handicap to him in any further undertaking, although cases are numerous where bankrupts have later in life made brilliant successes. If, therefore, your client seems simply to be suffering from temporary financial embarrassment; if he has a going concern which, in most years, is apt to be remunerative, you should be very slow to advise him to apply to the bankruptcy court.

It may be that you can obtain some relief by representing his situation fairly to his most pressing creditor and state to him that if he pushes his claim, your client will be obliged to go into bankruptcy, in which event the creditor knows that his chances of receiving any adequate dividend are slight. In many cases it is advisable to call an informal meeting of the principal creditors and lay the facts frankly before them and offer them what terms your client can make, either ir the way of partial payment at once with extension of time for the balance, or by making some other arrangement which the particular circumstances of the case may suggest to you.

Most business men today are dependent on the banks for ready capital to run their business, and your client's embarrassment may be caused by the failure of the bank, or by an unreasonable refusal on the part of the bank to renew his loans. In such case, you can do your client a real service very often by helping him to obtain credit at some other bank, or even in some cases by obtaining credit from the principal creditors, either by hypothecating to them your client's assets, or by giving them in some way an interest in the business. This is frequently done by forming a corporation and issuing to the creditors preferred stock for their claims. Your argument to the creditors will be, of course, that they are more interested in the continued welfare of your client's business than anyone else except your client himself.

In some cases it may be advisable to make a general assignment for the benefit of creditors to some friendly creditor or to let some friendly creditor apply for a receiver. These courses are usually wise, however, only in case of slight temporary embarrassment as they are both in themselves acts of bankruptcy of which an unfriendly creditor can avail himself to force your client into bankruptcy, as we shall see, and neither of them lead to a discharge. The blot on a man's reputation is practically the same in one case as in the other, and therefore it seems better policy usually to go straight into the bankruptcy court, where necessary.

If all of these courses are unavailable, either because your client is so hopelessly involved that he cannot obtain credit, or because of some hostile creditor

who is harassing him with attachments and suits which prevent him from doing business, then you can fairly say to him that the only way out of his present troubles is to file a petition in bankruptcy. In this case, before you do any work or spend any money in his behalf, you should, for your own protection, have your fees for the whole proceeding paid in advance or properly secured. It is proper for the bankrupt's attorney to have a mortgage or bill of sale made to him by the bankrupt of the bankrupt's property for security, or to have his fees for the bankruptcy proceeding paid at the outset, and the court will protect the attorney in thus obtaining a fair fee. In an ordinary case where there are little or no assets a fair minimum fee will be one hundred dollars, and the court will allow more, depending on the difficulty and size of the case.

If your client has positively no assets whatever beyond what he has given you for his fees, he may be able to take the pauper's oath and file his petition without court fees. Otherwise, however, you should obtain from him for the filing fees of the petition, thirty dollars. Of this amount the clerk receives ten dollars, the referee fifteen dollars, and the trustee five dollars. You will also be obliged later to pay the referee ten dollars for the expenses of notices, and whatever is not used from this sum will be returned to the bankrupt. The blank forms for petition will cost about a dollar and a half.

When your client first comes to you to talk over bankruptcy, you should particularly advise him to sign no papers without your knowledge and make no

private agreement or trade with any creditor, as this may be a ground for opposing his discharge as being a preference. If any creditor tries to force your client to sign new notes for the old obligations, and your client feels disposed to do so as a matter of honor or otherwise, you had better advise him to sign no agreement to that effect, but after obtaining his discharge he will have the right to pay his old indebtedness at any time he desires. It is also your duty to protect your client against his own fraudulent tendencies, as business men, when pressed by creditors, will often be ready to do things they would not think of doing under ordinary circumstances. You should therefore see that your client makes no secret conveyances of his property for the purpose of defrauding his creditors, or in any way makes any fraudulent concealment, as the penalties of the bankruptcy statute are heavy.

### WHO MAY FILE A PETITION AND WHERE

You should first consider whether your client is entitled to go into bankruptcy. Any "person" may file a petition to be adjudged a voluntary bankrupt, and the word "person" includes corporations, partnerships, and women. The only exceptions are a Municipal, Railroad, Insurance, or Banking corporation. A farmer or wage-earner may file a petition. The sole qualification is that he must owe debts, but no limit is fixed of the amount of such debts or their number, and one owing one debt only may file a petition unless that debt be paid, or one not released by the discharge. Even a solvent person may file a petition in bank-

ruptcy. If your client possesses the above qualifications he may be a bankrupt even although he is an alien or an Indian. A lunatic in all probability cannot file a petition, and infants and married women can only do so when under local law they are personally liable for their debts. Furthermore, your client must have had a principal place of business, resided or had his domicile in the United States for the period of six months or the greater portion thereof preceding the filing of the petition, or he must have had property within the jurisdiction of a court of bankruptcy.

The fact that an involuntary petition in bankruptcy has been filed against him is no bar to a voluntary petition on his own account, and neither is it any objection that he has already made an assignment for the benefit of his creditors in the state court. He must file his petition in the bankruptcy court in the district where he has had his principal place of business, resided, or had his domicile for the greater part of the preceding six months. Where your client has his principal place of business in one place and resides in another and has his domicile in another, he may have an election, and you should consider very carefully the local conditions and apply in the district where you believe your client will receive the most favorable consideration. You should carefully inquire of your client whether he has ever gone into bankruptcy before, as, if he has been granted a discharge in voluntary proceedings within six years, there is no use in filing his petition as he cannot obtain another discharge.

## DRAFTING A VOLUNTARY PETITION

When the question of fees and disbursements is settled to your satisfaction, you should obtain the proper blanks for a petition in bankruptcy and fill them out with the greatest care in triplicate and take pains that your client signs them in all the various places required.

### Schedules

In making out the schedules of assets and liabilities you should presume that one reason of your client's difficulties is on account of his lax business methods, and use every precaution in your power to make sure that the lists he gives you are accurate and complete. If your client omits from these lists any of these assets he lays himself open to prosecution for criminal concealment of assets, while under the present bankruptcy law if he omits any of his creditors, those creditors are not bound by the discharge unless they have actual knowledge of the proceedings. You should personally carefully examine your client's books and make sure that he has omitted none of his book accounts. You should then use every precaution to include in the petition any claims of any other nature which may be outstanding, such as actions of tort, claims on bonds he may have signed for others, accommodation paper, or any other possible claim against him. Business men frequently prefer not to put into their schedules the claims of tradesmen for household expenses or for wages, and this may be a matter of personal pride with your client in which you will follow his directions.

Your list of creditors will be made up with a view of binding each creditor by the discharge which you hope to obtain, and for that purpose you should fill out the name, debt, and address of each creditor as accurately as possible. The creditor is not barred where the residence is not fully stated with the street and number, unless unknown to the bankrupt, and you should put down the residence as unknown only where it cannot be obtained with reasonable diligence. The residence of the creditor for this purpose is not his office or that of his attorney or representative. Abbreviations in the schedule are expressly forbidden by the rules of court, and should be avoided. Resort to ditto marks, for example, in attempting to indicate a creditor's residence, should not be made. The creditor will not be barred where his name is misstated unless he has actual knowledge of the bankruptcy, although a slight error may be immaterial or a business name may be used. The owner of the claim at the date of the petition should be inserted in the petition if known to the bankrupt, where the claim has been assigned.

**Exemptions**

You will find in the bankruptcy schedules a portion devoted to claim of exemptions, and you should be careful that your client claims all exemptions to which he is entitled. The bankruptcy act adopts the exemptions set out in the local law of the several states and territories, and you should examine that local law and frame your schedules with that in view. Furthermore, by federal statutes, military equipment, pension money and lands acquired under the

national homestead acts are exempt, the latter, however, only as to debts contracted before the date of the homestead patent. The local law of the state of your client governs rather than that of the state or district where the petition is filed. The exemption laws commonly include wearing apparel, household furniture, tools and implements of a trade, and many states contain provisions exempting the family homestead from creditors. Where a partnership is in bankruptcy an individual partner cannot claim exemptions out of undivided firm property as against a partnership debt. The right of exemption in most states applies also to property which a bankrupt has fraudulently transferred, while some other states provide that property which has not been paid for or has been paid for with the proceeds of non-exempt property cannot be claimed to be exempt. The bankruptcy act has no effect whatever on the rights of the widow and children to dower and statutory allowances. It follows from what has been said of exempt property that a lien which is valid by state law will not be affected by bankruptcy, as the title of this property does not pass to the trustee but remains in the bankrupt, subject to such liens as he may have put upon it. You should be sure of your position before claiming the exemption and be prepared to defend it, for the matter is entirely subject to the control of the bankruptcy court, which has a right to look into the matter and decide it. Remember that a watch is not wearing apparel and must be included as assets in some jurisdictions. It is very important to claim the exemptions in the petition, as otherwise it is possible

your client will be taken to have waived his rights of exemption, and he will certainly be held to have waived them if he does not claim them before the discharge.

### INVOLUNTARY PROCEEDINGS

On the filing of an involuntary petition a subpoena will issue against your client which must be served upon him. Lawyers have been known to secrete their client to avoid service of the petition, but entirely aside from the fact that such conduct is unprofessional, it is hard to see what practical advantage there is in it as the rights of the creditors against liens date from the filing of the petition and the only effect of difficulty in obtaining service would be to delay an adjudication and prejudice the court against you. If your client secretes himself so that personal service cannot be made, notice will be given him by publication, or at his last and usual place of abode. Your client has the right to appear and plead without waiting for service and in some cases this may be wise to placate creditors. If you desire to question the validity of the service of the subpoena, you should do this by direct motion to set aside the marshal's return.

In case different proceedings are filed against your client in different courts you should see that the proceedings are transferred to the proper court so that only one proceeding will remain against him. You should protect your client against any abuse of this process, and if there seems no probable ground for the petition you should advise the creditors that you will hold them liable for all damages caused by the

filing of the petition. This may be sufficient to cause them to withdraw it as you have a right of action for damages for the institution of proceedings begun maliciously and without probable cause which terminate without an adjudication in bankruptcy.

When service is properly made you have then five days after the return day within which you may plead to the petition. It is your first duty to examine the petition with the greatest care and see whether it conforms with all legal requirements. You should first consider whether the court has jurisdiction of the proceeding, and you may attack this jurisdiction on the ground that your client did not have the necessary residence or place of business within the district or that the petition does not show the proper number of creditors.

The petition must be filed by three creditors whose claims in excess of any security aggregate $500 or over unless the total number of creditors of your client is less than twelve when one creditor may file a petition. If one creditor petitions, the fact that the total number of creditors is less than twelve must appear on the petition. If any of the creditors are corporations you should see that the petition is signed by the proper officers authorized to bind the corporation. The creditors may be estopped from filing a petition by having taken part in some act which they now claim to be an act of bankruptcy. The petition must show that your client owes debts to the amount of $1,000 or more and is within the class subject to bankruptcy proceedings, and if he has committed an act of bankruptcy within four months prior to the

filing of the petition you should insist that the act of bankruptcy is distinctly and properly set out and you have a right to ask for specifications as to just what the act consisted in.

If you desire to attack the petition you may file exceptions or you may demur or move to dismiss the petition but in making your dilatory pleas attacking the petition, you should remember that the court has the right to allow the petition to be amended and will probably do so to correct technical defects.

If you desire a jury trial on the question of the solvency of your client you should file a written application therefor within five days of the return day. When you do not claim a jury trial, the hearing will take place before the judge. It is usually wise to ask for a jury trial as a matter of tactics, as it will usually cause a delay in the proceedings and you can waive the claim at any time. This gives you more time to work up your defense. On the other hand, if you think the petitioners are not entirely prepared, you should not claim a jury trial but should insist on a speedy trial before the judge.

At the hearing of the question of adjudication, the burden of proof is on the petitioners to establish all the facts alleged in their petition.

If other pleadings are disposed of, you should then file a reply on the merits by answer, remembering that an answer before that time will waive any demurrer or other dilatory plea. The answer should be in the form prescribed by the Supreme Court. You may by answer interpose the defense that your client is exempt from adjudication; that he did not have

his domicile, residence, or place of business within the district for the greater part of six months preceding the filing of the petition; that the petitioners are not creditors or that their debts are less than $500; that your client has not committed an act of bankruptcy; and in most cases, that he was solvent at the time of the filing of the petition. The defense of solvency will depend on the act of bankruptcy alleged.

You should, in any negotiations looking toward a dismissal of the petition by the petitioning creditors, remember that any other creditors besides those who have filed the petition have a right at any time to intervene and insist that the petition be prosecuted.

## ACTS OF BANKRUPTCY

When the question arises whether your client has committed an act of bankruptcy, you should make a careful study of the facts and the law governing the situation. A detailed statement of what constitutes an act of bankruptcy is hardly within the scope of this monograph. If your client is a corporation, the creditors must prove that the act relied upon was committed by the corporation itself or by one having authority to bind it. In the case of a partnership the act of bankruptcy may be committed by less than all of the partners where such act was within the scope of the partnership business so as to constitute it in fact an act of the firm.

Only acts expressly set down in the bankruptcy statute can be claimed to be acts of bankruptcy, and these consist in general of a fraudulent conveyance, a preference, a general assignment or application for

a receiver or an admission in writing of inability to pay debts and willingness to be adjudged a bankrupt on that ground. The insolvency of the debtor at the time of a fraudulent conveyance need not be proved, as it is enough if he is insolvent at the time that the petition is filed. Insolvency is an essential to any preference or where the appointment of a receiver has been sought but not in case of a general assignment. The bankruptcy act lays down a rule for insolvency which is, shortly stated, that one is insolvent whenever all his property is less than the amount of all his debts.

In case a preference is charged, the creditors must prove the actual transfer of property and your client's intent to prefer the creditor in question, and the insolvency of your client at the time of the transfer. They must also show that the property transferred belonged to the debtor. Preferences may be involuntary as where your client has suffered or permitted a creditor to obtain a preference through an attachment or sale on execution or other legal proceedings. All acts of bankruptcy must be shown to have taken place within four months of the filing of the petition.

### PARTNERSHIPS

Partnership proceedings in bankruptcy are more complicated than any other form of proceedings, and to understand them a clear knowledge of the substantive law of partnership is necessary. The bankruptcy act recognizes the partnership as a separate entity to some extent. Thus the partnership may file a voluntary petition or all or any one of the partners may

file a petition, or an involuntary petition may be filed against a partnership as a whole, or against partners or any one of them. As all the partners are personally liable for the partnership debts, it follows that the partnership is insolvent only when the firm debts exceed the value of the property of the firm and that of the partners applicable to the payment of the firm debts. A firm is solvent while any of the partners are able to pay the firm debts.

Where a petition is filed by all of the partners it is a voluntary proceeding and the solvency of the firm is immaterial, and when a petition is filed by less than all of the partners the non-assenting partner may defend on the ground that he is solvent and therefore the firm is solvent. Where creditors of your clients file an involuntary petition they must prove the partnership as insolvent whenever such an allegation is necessary in the case of an individual. One partner in a partnership may file a petition or a petition in involuntary bankruptcy may be filed against him. In case some of the partners are not bankrupt, such partner or partners should settle the partnership business as expeditiously as possible. In such proceedings by or against an individual partner the partnership debts and assets are not concerned but the individual debts and assets, including the interest of the bankrupt partner in the partnership, are administered in bankruptcy.

If your client is a member of a partnership which has no assets, you must so act that he will obtain a discharge from his partnership as well as his personal obligations. This may be done by an individual

petition setting forth the partnership as well as individual debts and assets and giving notice to the firm partners of the proceeding, but in such case the safer course is to have both the partnership and your client adjudicated bankrupts, as then there can be no question but that a discharge will operate as a release of both firm and individual liabilities. Where all the partners unite in a petition, the filing of such petition is an act of bankruptcy, and the prayer should be to discharge both the partners and the firm, that the firm and the several partners constituting said firm may be adjudged bankrupts. You must file with the petition a schedule of the assets and debts of the firm and a separate schedule of the debts and assets of each partner.

Where creditors bring involuntary proceedings against your client, their petition against the firm and the partners constitutes one proceeding and must contain the same requisites as in case of proceedings against an individual. They should name all of the partners and bring them before the court. The creditors are bound to prove affirmatively that the partnership exists, and that an act of bankruptcy has been committed, both by the partnership and by each individual partner. If one of the partners is exempt as a wage-earner or a farmer, he cannot be adjudged a bankrupt in involuntary proceedings.

If some of the partners desire to go into bankruptcy and some do not, some of the partners may file a petition to bring the firm and the partners into bankruptcy, and such proceedings are voluntary as to the petitioning partners and involuntary as to

partners refusing to join. The petition should state the names of all the partners and ask for notice to be served on the partners not petitioning. The petition need not set out an act of bankruptcy by the firm or the petitioning partners other than their inability to pay debts, and willingness to be adjudged bankrupts on that ground. In order to bring into bankruptcy partners not joining in the petition, an act of bankruptcy must be set out against each of these, and in such case a separate schedule of the assets and debts of each petitioning partner must be annexed to the petition, and you must see that notice is properly served on all partners not joining in the petition.

You may have a wide choice as to the court you select for the petition in a partnership case, as it may be filed in any district where the firm has had its principal place of business for the greater portion of the six months preceding the filing of the petition, or it may be filed in any district where a court of bankruptcy has jurisdiction of one of the partners. In case of opposing interests you should try to file your petition as soon as possible, as where petitions are filed in separate districts, that court where the petition is first filed has sole jurisdiction.

You must advise your client that when the partnership itself is declared bankrupt, this brings into the bankruptcy court the individual assets and debts of the several partners to be there administered. When you come to the election of a trustee in a partnership case the same considerations apply as in individual cases.

Where a firm is adjudged bankrupt, the creditors

of the partnership appoint a trustee for the creditors, and the individual partners are not entitled to vote. Where a partner in a firm is adjudged bankrupt, the trustee may be elected by the firm creditors and the individual creditors of that partner. A trustee, if elected by the firm creditors where a partnership is adjudged bankrupt, administers both the partnership property and the property belonging to the individual partners, even when they are not adjudged bankrupt. Where the partners and not the firm are adjudged bankrupt, the trustee administers the individual estate of the partner, including his interest in the partnership, but has nothing to do with the firm property. Where your client is a member of different firms, and adjudications are made against all of them, each estate must be accounted for separately, but where the same partners conduct business in different places under different names, the two firms will be treated as one firm in the distribution of assets. You may have to advise your client as to what are firm debts and assets. A general rule is that firm assets are those assets used in the general firm business, while individual assets are, of course, the private property of the partner, which has nothing to do with the business of the firm as transacted in its usual course. As to debts, there may be very troublesome questions as to what debts contracted by individual partners were contracted in the name of the firm, and what are individual debts contracted in the partner's private business.

Proceedings for a discharge are the same in partnership as in other cases, and the general rule will

be followed that whoever is adjudicated bankrupt may petition for a discharge. You must be sure that your individual client gets a personal discharge, as the only effect of a discharge of the partnership is to release the firm from firm debts, and this does not affect the liability of a partner for those debts. The partner, of course, cannot obtain a discharge individually unless he has been adjudicated a bankrupt. A personal discharge by a partner will release him from firm as well as individual debts when the firm debts are properly scheduled, although there is some authority to the contrary.

### CORPORATIONS

If your client is a corporation which must go into bankruptcy, the question at once arises who has the authority to authorize the filing of the petition. Doubtless, in some cases the Board of Directors may be given this authority, but as a general rule you should have a regularly called meeting of the stockholders and have the stockholders pass a vote authorizing the execution and filing of a petition in bankruptcy. All corporations except a Municipal, Railroad, Insurance, or Banking corporation may go into bankruptcy, and even a charitable or religious corporation has that privilege.

### LIENS

The nature and validity of the liens against your client's property will, very often, determine your attitude in regard to filing a petition in bankruptcy,

as a lien which stands on record for four months is good as against a trustee. You may find it necessary to prevent any one creditor from obtaining a preference over others to hasten your petition in bankruptcy and take pains to file it before the expiration of the four-months period. Creditors who are alive to their rights will also bear this in mind and will, doubtless, file an involuntary petition within the four-months period, if you do not file a voluntary petition for your client. The validity and extent of a lien is determined by local law, as the bankruptcy act recognizes all liens valid under state law unless prohibited by the bankruptcy act. It is a prime necessity of such a lien that it be recorded in accordance with state laws, and the difficult questions as to just what liens are valid and when possession under a lien is sufficient, are hardly within the scope of this Lecture. In considering these liens you will, of course, remember that the trustee is bound to prove that the lien accrued against your client at a time when he was insolvent. The four-months period dates from the time of the creation of the lien, and not its enforcement. These principles apply to admiralty, to an assignment or lien on future earnings, to attachments, to a lien of an attorney or auctioneer, or to an equitable lien as obtained by creditors by agreement to give security, or by assignment. Such liens may also be created by various proceedings supplementary to execution, by garnishment or by judgment. The lien may be a common law lien, as that of a landlord or artisan, or a mechanics' lien created by state statute, or a mortgage or pledge.

## ELECTION AND EXAMINATION OF TRUSTEE

When the adjudication has been had, the next important proceeding is the election of the trustee. You should remember that the bankrupt has no right to interfere in any way directly or indirectly with the selection of the trustee, and you should advise your client to that effect. If you, or anybody representing the bankrupt, solicit claims in any way to vote those claims at the creditors' meeting, all such claims may be thrown out at the election and the votes not counted. If some officer or employee of the bankrupt has a claim, you should be a little cautious how you let him vote, as his vote for one candidate might give the referee the impression that that candidate was really working for the bankrupt and not for the creditors, and might lead the referee to refuse to confirm him if elected. As a matter of practice, in most cases, the bankrupt and his attorney do exercise all the influence they can in favor of the election of some trustee whom they think will be favorable to the bankrupt.

You have a right, however, to insist that the trustee shall be fair minded and unbiased, and you can properly object to the confirmation of any trustee whom you can show the referee to be actuated by personal spite or malice against your client. You can also argue that the trustee selected by the creditors is entirely unfitted through ignorance of your client's line of business to handle the situation, and that his confirmation might be of great injury to your client. If you make any such objection, you

will, of course, state to the referee that you have no one in mind whom you would like to have appointed but will be satisfied with any unbiased person who is competent to attend to the business. Such an objection, however, is very dangerous, as, if you fail, you will at the start have prejudiced the trustee against your client, and no such objection will prevail anyway unless you make out a very clear case.

In order to constitute an election, one candidate must have a majority in number and amount of all the unsecured claims which are presented and voted on at the meeting.

When the trustee is once selected, you should make every effort to co-operate with him in his work, as his good will is absolutely essential for you to obtain a discharge. You should offer to have your client submit to an examination at any time at the convenience of the trustee; you should bring him all the books of account of the business and offer to assist him in any way in explaining any matters he may desire. You have an absolute right to be present at the examination and to warn your client not to answer any question which may tend to incriminate him by subjecting him to criminal proceedings. It may be very difficult for you to decide what course to pursue as to this. You should first satisfy yourself, if possible, whether your client is in fact guilty of impropriety, remembering always that your client may be as likely to try to deceive you as others. If you believe your client to be innocent, you should, in most cases, offer no objections to any questions whatever, while if you fear he may be guilty, your conduct will

depend on the circumstances of each case, remembering always that even a criminal has a right to the protection and advice of counsel.

### CONTEMPT

You should see that your client does not subject himself to liability for contempt of court, either by disrespect to the court or its proper officers, or by failing to answer questions or to turn over property when ordered, or to obey any other order of the court. The only defense your client can have for failing to obey an order of court is his bona fide inability to comply with it or that the order itself is void. In case your client is charged with contempt of court, the proceedings against him may be either criminal or civil in nature, and ordinarily in case of a constructive contempt not committed in the face of the court, will be begun by a petition or information. The court will then give your client notice of the proceedings, and he will have an opportunity to file an answer in which, under some circumstances, he may purge himself of the contempt by affidavit explaining the whole matter, although it is the modern rule that the denials of the bankrupt are not conclusive on the court. You have a right to insist that the contempt proceedings should be heard before the court and not before the referee. If your client has been arrested you will, of course, obtain bail, if possible, for him.

### OFFENSES

It is your duty carefully to steer your client clear of any of the offenses laid down in the Bankruptcy

Act, for if he is found guilty of any of these acts he will be denied his discharge. The offenses include concealment of property from the trustee by the bankrupt; and here you must remember that the courts have said that on account of the nature of the transaction, reliance must be placed on circumstantial evidence, and you must, therefore, be prepared to explain to the trustee any unexplained shrinkage of assets or any other suspicious circumstances. It is, of course, an offense to make a false oath or account in bankruptcy or for any person to receive property from the bankrupt with intention to defeat the act. Extortion, by attempting to obtain money or property in return for any course of conduct in bankruptcy proceedings, is also an offense. If your client is charged with any one of these things, your client's schedules in bankruptcy may be admitted as evidence against him, and if he delivers his books of account or papers to the trustee without claiming an immunity on account thereon, any such immunity is waived and all such books of account and papers are evidence against him. His testimony, if given by him, at a creditor's meeting cannot, however, be used against him.

### COMPOSITIONS

Under some circumstances it may be wise for you to make an offer of compromise to the creditors as provided for by the Bankruptcy Act. The offer will consist of a statement of your client's assets and all his debts, and state what percentage of these debts you are willing to pay in consideration of receiving a discharge. The creditors will then hold a meeting

and decide the matter and the majority in number and amount of the creditors can vote to accept the offer and thus bind all other creditors. The offer of composition cannot be made until after the filing of the schedule and the examination of your client in court or at a meeting of the creditors, although the offer may be made before adjudication. If it seems advisable to make an offer in composition at all you should make it in an involuntary case before the adjudication and thus try to save your client the stigma of adjudication.

The composition will not be ordered, however, until your client files in court the acceptance of his offer signed by a majority in number of all the creditors whose claims have been allowed, which must represent the majority in amount of such claims. He must also deposit in court the consideration to be paid by him to the creditors, including the money necessary to pay debts which have priority and the costs of the proceeding. The composition may be opposed by other creditors and will not be confirmed by the court if it appears that your client has been guilty of any offense, or has laid himself open to any of the objections which would bar his discharge, and furthermore it must appear that the agreement of composition was not obtained by fraud. If the composition is confirmed by the court its effect is to revest in the bankrupt the title to his estate and discharge the trustee, and discharge your client from his debts, except those agreed by the terms of the composition to be paid, and those not affected by the discharge. You must remember that even after the

composition is confirmed the court has power to set it aside for fraud.

### ARBITRATION

In case you get into any controversy with the trustee you may properly suggest to him that he leave the controversy to arbitration and he may then make application to the court setting out clearly the whole matter and giving notice to the creditors and asking that the order of arbitration be issued.

### PETITION FOR DISCHARGE

The real purpose of your client in going into bankruptcy voluntarily is to obtain a legal discharge from his debts and it is your duty to frame all your action and advice with this in view. The creditors may oppose his discharge, as we shall see, on certain limited grounds and you should if possible so advise your client as to give the creditors no grounds to object.

The petition for discharge you must remember is a separate proceeding from the original bankruptcy petition. Your original petition was simply for an adjudication and can not entitle your client to a discharge. It is your duty therefore to be sure to file for him his petition for a discharge as a separate petition, which will, however, be numbered and treated as a part of the bankruptcy proceedings.

This petition may be filed after the expiration of one month and within a year subsequent to the adjudication in bankruptcy, and it is well to note on your diary the earliest date when you are entitled to file

it. The time of course dates from the original petition in voluntary cases, as the adjudication takes place on the filing of the petition.

Whether it is wise or not to file a petition at the earliest possible date is a question which you should carefully consider. The trustee at that time may not have completed his examination of the bankrupt and may not have satisfied himself that your client has made a full disclosure of all his assets. Furthermore, you must remember that notice of your petition will be sent to all creditors, and some creditors may be angry with your client for going into bankruptcy and will be more likely to oppose his discharge if you file your petition promptly than if you wait for the lapse of time to heal their wounds. The petition for a discharge filed promptly at the end of thirty days will almost always be premature as a practical matter, and when the trustee is called upon to report as to the discharge he will almost always ask for further time, so that you will really gain nothing by prompt action. The wiser course will be in most cases to confer with the trustee from time to time and offer him all assistance in his work and file your petition as soon as he is ready to report on the discharge. Of course if you find that the trustee or any of the creditors are irreconcilably opposed to the discharge your tactics will be different and you will then file your petition and push it to a hearing as promptly as possible on the theory that this will put the creditors to the expense of preparing for trial which they may be unwilling to incur and that a vigorous determination on your

part to press for a hearing will make them think that your client has a good case on which to obtain a discharge and that it is useless to oppose it. You may also find that some creditors are opposing the discharge simply as a species of blackmail in an attempt to force your client to sign new notes promising to pay his old indebtedness or to obtain for themselves some other particular advantage not possessed by the other creditors. You should particularly advise your client to sign nothing without your advice and to make no promises whatever to any creditor, as any such special advantage is illegal under the bankruptcy act, the theory of which is that all creditors shall share equally in the bankrupt's estate and that an honest bankrupt is entitled to his discharge without making any trade with any creditor to get it. If, therefore, you push the petition for discharge vigorously you will disarm any such creditor, as you will force him to prove his case, and your client should then promptly be given his discharge by the court.

The petition for discharge may be filed by any person who has been adjudged a bankrupt, whether in voluntary or involuntary proceedings, and even by an insane person. The petition should be on one of the regular forms prescribed by the court, setting out the name of the bankrupt, his residence, and the date on which he was adjudicated, that he has given up all his property and fully complied with the bankruptcy act, and should contain the prayer that he may be given a full discharge from all debts provable against his estate, except such debts as are exempt

by law from the discharge. It must be signed and dated by the bankrupt in person.

A petition for discharge may be filed after the end of the year and within eighteen months from the adjudication only on leave of court after notice to the creditors. It must be filed in the clerk's office of the district court. The time is computed by excluding the first day and including the last, unless the last fall on a Sunday or holiday, when the day last included will be the first secular day thereafter.

The clerk's office is bound to send notice to all creditors as soon as the petition is filed and it is your duty to see that all creditors are properly notified and that the clerk makes a proper return of the proceedings to that effect, as this is vital to the validity of the discharge. If any creditors have become known to you and were not included in the petition in bankruptcy, you should have the petition amended by including them before you file your petition in discharge. But if these new creditors come to your attention after the petition in discharge is filed, you should arrange with the clerk's office to send them notice of the petition for discharge in time to appear and oppose it. Even a creditor who has not proved his claim is entitled to have notice.

### OPPOSITION TO DISCHARGE

The discharge may be opposed by any creditor who has an interest in it and therefore not by one whose debt is not affected by the discharge. It may be opposed also by the trustee in bankruptcy and the

executor or administrator of a deceased creditor. If the creditor who opposed the discharge abandons it the court may permit other creditors to carry on the opposition as if they had originally begun it. A creditor may file an appearance in opposition to the discharge on the return day of the order of notice and within ten days thereafter he must file specifications in writing, setting out the grounds of his opposition. If specifications are filed you should examine them carefully and see that they are complete, showing the name of the creditor and that he is a party in interest, containing allegations of fact and not conclusions of law, and it is not enough to follow the words of the act, except as to the charge of failure to keep books of account. Where the ground of objection is some crime under the act the crime must be described with the same particularity required in a criminal information and must be charged to have been "knowingly and fraudulently" done. Concealment of property, false oath or other fraud must be set out showing the exact facts relied upon, and the specification must be signed and sworn to by the party in interest or by his agent or attorney who swears to have knowledge of the facts.

If you desire to attack the form of the specifications you can move to strike them out if they are vague or you may rely on this defense on the hearing, as the court is bound to disregard a vague allegation. If the allegations are insufficient you may demur or file exceptions to them. If you do not object, the defect will be regarded as waived unless the specifications are clearly insufficient. If you desire to

defend by way of confession and avoidance you should file an answer setting out your client's position clearly. As a matter of policy it is usually better to file all possible objections to the creditor's pleadings, as the harder you fight and the more trouble you put them to, the more apt they are to lose interest in the case. Creditors are usually not willing to spend much money, as it is usually impossible for them to combine and share expenses and no one creditor or group of creditors is apt to risk much money in litigation which must inure to the benefit of all. Of course if the trustee has in his hands sufficient property to pay for litigation the situation is different, but one or two creditors will soon tire of spending money simply to punish the bankrupt or benefit the estate.

## GROUNDS FOR OPPOSING A DISCHARGE

The creditors may oppose your client's discharge on various grounds, but whatever the ground you must remember that the burden lies on them to prove whatever facts they set out. One ground of opposition is that the court has no jurisdiction of the proceedings. The creditors may allege that your client has committed some offense under the bankruptcy act, as concealment of property, making a false oath or presenting any false claim for proof or using any such claim or has taken or received any property after the filing of the petition which belongs to the creditors or has extorted or attempted to extort anything as a consideration for acting or

forbearing to act in bankruptcy proceedings. These acts do not include acts of the bankrupt in the proceedings for the discharge itself. Another ground for opposing the discharge is collusion with a creditor to prevent his filing any opposition to the discharge, and it is your duty to see that your client makes no such bargain. Another ground for opposition is that the bankrupt has destroyed, concealed or failed to keep books of account or records from which his financial condition might be ascertained, if he has done this with intent to conceal his financial condition. The creditors must prove this intent on the part of your client. The bankruptcy act requires no particular form of accounting and you need not worry about this charge if your client has kept reasonably correct books in the form commonly used in the business in which he is engaged. You will, of course, advise him when he first comes to you on no account to destroy or conceal any books that he may then have, as the trustee is entitled to them.

Another ground for opposing a discharge is the making of a false statement in writing to a creditor for the purpose of obtaining property on credit which your client has obtained. The creditor must prove that the statement was wilfully and intentionally misleading and that it was relied upon by the creditor when he sold the goods to your client. Another bar to the discharge is that the bankrupt has within four months before the filing of the petition transferred or concealed any of his property with intent to hinder, delay, or defraud his creditors. This language covers a fraudulent transfer within

the old English statute of Elizabeth and when this charge is made against your client you should study the decisions which consider that statute as well as the bankruptcy decisions to see that the creditors bring their case within the authorities. Another bar to the discharge is that your client has already received a discharge within six years of the date of action upon the new petition. Your client will also not be allowed a discharge if he has refused during the proceedings to obey any lawful order or refused to answer any proper question put to him.

### HEARING

You are entitled to a full hearing before the court on the question of discharge, although the court may send the matter to the referee, sitting as a Master in Chancery, to report the facts and his recommendations, and the court may even frame issues to be tried by the jury, although this latter expedient is seldom resorted to. At the hearing the statements made by your client in his examination are material, but you must not allow the previous testimony of any other witnesses to be introduced against him. You should see that the record disposes of the creditors' objections to the discharge, before the final order of discharge is made up.

### EFFECT AND REVOCATION OF DISCHARGE

The effect of the discharge is to bar any action on the debt, but it does not extinguish the debt itself. You should therefore advise your client if he should

be sued later on any debt included in the discharge that he must appear in the proceeding and set up his discharge, as otherwise a new judgment may be obtained against him on the old debt. For the same reason a new promise in writing may enable the creditor to sue on the old debt and therefore you must advise your client very carefully not to make any promise to pay those debts which are included in the bankruptcy proceeding. A discharge is not a bar to taxes or to liabilities for fraud or wilful or malicious injuries, alimony or support of wife and child, seduction, or criminal conversation. A discharge is further no bar to creditors who are not included in the proceedings, unless your client can prove that they have notice or actual knowledge of it. Wilful and malicious injuries include liabilities for alienation of affections, assault and battery, false imprisonment, malicious prosecution, and libel or slander, while liabilities for ordinary conversion of property without malice or negligence without malice are released by the discharge. A discharge is further no bar to a liability for misappropriation or embezzlement or any breach of faith by a fiduciary. This latter word includes attorneys or public officers, but not ordinary bailees, buyers and sellers, bankers or brokers, or partners unless these have acted with malicious intent.

A discharge after it has once been granted may be vacated or revoked on petition filed at any time within a year by parties in interest who have not been guilty of laches in opposing the original discharge if the discharge was obtained through the

fraud of your client. As a practical matter the discharge will not be vacated unless the court is satisfied that the creditor had no knowledge of the fact relied upon at the time the discharge was granted.

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